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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 305

CITIES SERVICE COMPANY and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Petitioners,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

TIMOTHY N. PFEIFFER,
Counsel for Petitioner,
The Chase National Bank of the City of New York.

ROY C. HABERKERN, JR.,
REBECCA M. CUTLER,
RALPH C. MURRAY,
of Counsel.

THEODORE N. JOHNSEN,
Counsel for Petitioner,
Cities Service Company.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the United States District Court, Southern District of New York, is reported at 93 F. Supp. 408 (R. 43-48). The opinion of the United States Court of Appeals for the Second Circuit is reported at 189 F. 2d 744 (R. 55-62).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered June 13, 1951. The petition for a writ of certiorari was filed September 8, 1951 and was granted

November 5, 1951. The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

Statute and Executive Orders Involved

The statute here involved is the Trading with the Enemy Act, 50 U. S. C. App. §§ 1 et seq.; and the Executive Order is 9193, 7 F. R. 5205 (which amended Executive Order 9095) as amended, 10 F. R. 6917*; 50 U. S. C. A. App. (1951) p. 43. Pertinent provisions are set forth in the appendix, pp. 53-58.

Questions Presented

1. Are the Trading with the Enemy Act, which requires that property to be vested be "subject to the jurisdiction of the United States", and Executive Order 9193, as amended, which requires that it be "within the United States", properly to be construed as authorizing the vesting of all rights under negotiable bearer bonds physically located outside the United States and never seized?

2. Can the Act and Executive Order be construed as permitting, as an inevitable result of the vesting, the taking and retention of property of persons not determined to be "enemy nationals" or acting for "enemy nationals"?

3. Can the APC, by a purported vesting without manucaption, change the obligation on a negotiable bearer bond so as to compel its reissue or payment without either surrender or provision for adequate indemnity?

4. As the Act provides expressly that the only relief for any person having any claim to any property transferred to the APC is the relief provided in the statute, and as the Act fails to provide any remedy to a non-enemy

* Executive Order 9760, 11 F. R. 7999, and Executive Order 9788, 11 F. R. 11981, did not affect Executive Order 9193 in a way pertinent to the issues here.

citizen deprived of his property by the imposition of double liability, can a right to compensation for such a taking be implied? Is such an implied obligation to compensate—where the basis is so uncertain and the manner and time of enforcement are not provided for—sufficient to save the statute, as construed and applied in this case, from unconstitutionality under the Fifth Amendment?

5. If on the other hand the obligors are protected from double liability, will not the vesting of foreign-held bonds under these circumstances deprive innocent non-enemy holders of bonds of their property without notice or opportunity to be heard?

Statement

The present action was brought by the Attorney General, as successor to the Alien Property Custodian,* to compel, from the debtor (Cities Service Company) and the "indenture trustee" (the Chase National Bank), either the payment of, or the issuance of new bonds for, certain bonds which were purportedly vested as property of a German national resident in Germany. (Complaint and Vesting Order annexed, R. 3-10.) The instruments were not surrendered or offered to be surrendered; the complaint alleged that they were not obtainable by the APC (R. 5). No holder was joined as a party (R. 1).

The instruments in question were fully negotiable bearer debentures** under seal (R. 33-34, 55; see also the

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* For convenience and simplicity, the letters APC are used hereinafter to designate whatever official was at the time administering the vesting program, together with the office under him.

** The instruments were debentures, but they are referred to in the vesting order as bonds; and since for present purposes there is no difference between a debenture and a bond, the two terms are here used interchangeably.

Indentures,* at pp. 1, 7 of the 1930 Indenture and pp. 1, 5 of 1929 Indenture). According to the APC, they were outside the United States when he directed the turnover of the property (R. 14).

The Vesting Order, No. 12960, dated March 11, 1949, purported to vest the "debt or other obligation" evidenced by, and "all rights in, to and under", three bonds (R. 8-9). There was no mention of coupons. On March 28, 1949, Cities Service Company was directed by the APC to note the APC's ownership on its books (R. 11-12); and on June 17, 1949 was told to "cancel" two bonds which had been called, and to pay over the proceeds of redemption together with interest represented by unpaid coupons, and to "cancel" the third bond and issue a new bond with any unpaid coupons attached, or at the option of Cities Service to pay the amount thereof (R. 13-16). No demand prior to suit is alleged to have been made on the Bank.

At the time when the turnover of the property was called for, the APC informed Cities Service that the bonds were in Germany (R. 14). According to information now in the possession of the Government, the three bonds had been in Berlin, in the Russian sector, and had been seized by the occupying authorities at some time prior to the date of the Vesting Order (R. 33).

One of the three bonds, which the APC had stated in its letter of June 17, 1949 to be in Germany (R. 14) (one of the two which had been called) had in fact already been presented for payment at the offices of the Bank in New York and had been paid in usual course before the

* It was stipulated that the Indentures, printed copies of which are on file with this Court, need not be reprinted as part of the record, but that they might be referred to by either side. Two are involved, one dated as of March 1, 1929, one as of June 2, 1930 (R. 33).

date of the Vesting Order (R. 32). The claims relating to this bond and its coupons have accordingly been dropped (R. 32). Another of the three was presented to the Bank in New York for payment on January 5, 1950 on behalf of Globe & Rutgers Fire Insurance Company—indisputably a non-enemy concern; was returned by the Bank unpaid because of the Vesting Order, and is now apparently in New York in the possession of a New York brokerage firm (R. 32-33). The whereabouts of the third bond is unknown (R. 33).

Neither of the governing Indentures makes provision for the issuance of a new debenture to replace one already issued, unless the instrument has been mutilated, destroyed, lost or stolen, *and* provision made for adequate indemnity satisfactory to the debtor and the trustee against possible liability. (See particularly Art. II, Sec. 9 of each Indenture; also R. 33-34.) In each Indenture the debtor covenanted not to issue any debentures thereunder except in accordance with its provisions. (See Art. III, Sec. 6 of each Indenture.) Payment either of the bearer debentures or of the coupons appertaining thereto is conditioned upon presentation of the instruments. (See the form of bearer instrument quoted at the beginning of each Indenture.)

The present action was instituted January 30, 1950 (R. 1). The District Court (McGohey, *D. J.*) granted petitioners' motions for summary judgment* (R. 49-50). The court held that, since in the case of a negotiable bearer bond the instrument embodies the property right, the Vest-

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* The Bank's answer had raised, among others, the issues whether the Vesting Order was within the authority of the Trading with the Enemy Act and the Executive Order, whether there was invalidity under the Fifth Amendment, and whether the suit should be dismissed for absence of indispensable parties (R. 22-24).

ing Order was unauthorized in that it sought to vest property which was not "subject to the jurisdiction of the United States" or "within the United States" as required by the Trading with the Enemy Act and Executive Order 9193, as amended (R. 47-48).

The Court of Appeals reversed the judgment of the District Court, and directed summary judgment for the APC (R. 62). The court, apparently relying partly on the broad language of the Act as to debts and choses in action, partly on the history of Equity's development of a remedy where bonds were lost, and partly on the practical power of the United States over the debtor and the trustee present in the United States, held that the Act could and did apply to negotiable bearer bonds of United States issue located abroad (R. 56-58). The court did not discuss what Congress in the statute and the President in the Executive Order intended in imposing the limitations that the property be "subject to the jurisdiction of the United States" and "within the United States"; and indeed the court did not mention the Executive Order at all. Recognizing the force of the argument that petitioners were under the threat of double liability because of possible judgments abroad, against which the Act's exculpatory provisions offered no adequate protection, the Court of Appeals reached the conclusion that any resultant taking of the petitioners' property would not be in violation of the Fifth Amendment, because an implied promise to compensate on the part of the United States would then arise (R. 59). It is not clear from the opinion of the court when it thought the "taking" of the obligors' property would occur or whose act would give to the obligors a present right to compensation. In some passages it would appear that the court thought that the adverse judgment of a foreign tribunal would, in some manner, amount to a "taking" *by the*

United States; in other passages, it would appear that the court felt that the vesting by the APC constituted the "taking" but that such "taking" would not become complete and no obligation to compensate would arise until the entry of the foreign judgment (see R. 59, 60). The court did not specify any statutory provisions under which the debtor or trustee could proceed against the United States to recover compensation. Its opinion did not consider the other constitutional problem: *i. e.*, whether the insufficiency of the statutory notice as to innocent non-enemy purchasers of the bonds, and the short statute of limitations for suits against the APC under the Act,* if coupled with inability to obtain a remedy against the obligors, would deprive such bondholders of their constitutional rights under the Fifth Amendment.

Errors Urged

The United States Court of Appeals for the Second Circuit erred:

1. In holding that the negotiable bearer bonds involved were "within the United States" and "subject to the jurisdiction of the United States" at the time of vesting, despite the fact that neither the instruments nor their holders were shown to be here.

2. In holding that Executive Order 9193 as amended and the Trading with the Enemy Act could be construed as authorizing the vesting of these bonds located abroad.

3. In holding that the vesting could be enforced despite the fact that the performance it called for varied the obligations assumed by the debtor on the bonds and the trustee under the Indentures.

4. In construing the Act and Executive Order as permitting the vesting even though there should re-

* § 33.

sult taking and retention of property or interests of persons not determined by the APC to be "enemy nationals" or acting for "enemy nationals".

5. In holding that under the Act an implied right to compensation from the government would arise should property or interests of petitioners be taken as a result of double liability; and that such an implied right was sufficient to save the constitutionality of the Act as here applied.

6. In holding that the construction and application of Act and Order here made were consonant with the requirements of the Fifth Amendment.

Summary of Argument

Before summarizing the arguments, we wish to stress the following questions which are fundamental to the issues here presented: (a) whether the rules which are sometimes damned with the label "situs" are not, in situations like this, rules of essential fairness, evolved over the years for cases where all parties affected are not within reach; (b) whether there are not basic differences under the statute between blocking and vesting and between the situations in which each can be applied; whether the purposes of Congress as so far enunciated cannot be achieved in the present case by blocking, whereas if vesting is carried out, statute and Executive Order are distorted and constitutional principles are endangered; and (c) whether the uncertain test of general purposes never clearly defined by Congress can safely be used to extend statutory language which already bestows unusually great powers on an executive agency.

The court below was concerned with what it deemed the practical need for this vesting program; but even in the light of that consideration, doubt remains whether the decision achieved a satisfactory result. Economic war-

fare is hardly furthered by a purported seizure of bonds where the practical consequence is that the assets go around in a circle. That is the result adumbrated by the court below: (1) the American obligor is directed to pay the APC; (2) the foreign holder—whose courts are beyond our reach—recovers abroad from the obligor; and (3) the United States Government then repays the obligor. Even if only steps (1) and (2) occurred, the professed purpose of the Act to utilize enemy assets would still not be achieved—whatever the advantages of revenue brought in by a method that would be indefensible as confiscation.

The foregoing throws light on the essential issue here: whether the APC has the right to vest—as distinguished from block—negotiable bearer bonds located abroad. The argument that the Act, the Executive Order and the Fifth Amendment all call for dismissal of this complaint is based primarily on the following contentions:

1. The Trading with the Enemy Act authorizes vesting, upon the terms designated by the President, of any foreign national's property which is "subject to the jurisdiction of the United States" (see §5(b)). Though the same limitation as to jurisdiction is not express in §7(c), it must be read into that provision, both because of general principles of statutory construction, which presume territorial limitations, and because the subsequent enactment of the limitation in §5(b) compels that result. To the extent that the Executive Order in delegating authority to the APC, pursuant to the statute, narrows the scope of that authority, the more rigid requirements of the Executive Order will be controlling. By Executive Order 9193, as amended, the APC's authority to vest

in this instance exists only if the property is that of an enemy national and is "within the United States."

A negotiable bond cannot be said to be subject to the jurisdiction of or within the United States if neither the instrument nor its holder is here. The rule is often expressed in terms of *situs*, or the doctrine that the property inheres in the instrument, but back of it lies the realization that, because of the necessity of free transferability and the resultant rights of the bona fide purchaser against the obligor, it would be unfair to the latter in the case of a negotiable instrument to make him pay other than the holder while the instrument is still at large and the holder not within control. There has been generally recognized a difference in this respect between a debt embodied in a negotiable instrument and a simple debt, and between a negotiable bond and a stock certificate.

When Congress legislated, the limitations on jurisdiction in regard to negotiable instruments were generally recognized. There is nothing in the statute itself or in the legislative history to indicate that Congress intended to alter the accepted rules in this respect.

2. To the extent that the vesting is ineffective as a seizure of the bondholder's rights—and the force of the argument that it is thus ineffective abroad was recognized by the court below—what is being seized is not the enemy's rights in the bond, which cannot be effectively divested, but the obligor's own property. Likewise to the extent that the vesting creates a new or different obligation (to pay without either presentation of the instrument or indemnity against loss that might result from failure to present), it is the obligor's rights that are being taken. The statute and Executive Order, however, furnish no authorization for seizure and retention of the property of

citizens without enemy taint; or for vesting a nonexistent obligation. There has been no determination by the APC, or suggestion, that the Bank or Cities Service Company has any enemy taint; and the APC's finding that the debt evidenced by the bond is enemy owned is insufficient to support seizure of funds belonging to the obligors, unless their obligation on the bond is thereby terminated.

3. The construction of the Act and Executive Order given by the court below results either in actual unconstitutionality or in such serious question of constitutionality as to forbid that construction.

(a) *As to possible innocent non-enemy bondholders.* Absence of any practical notice, especially when combined with the short statute of limitations running from the date of the vesting, renders wholly illusory the theoretical remedy which § 9(a) of the Act might be argued to give to innocent non-enemy holders abroad. Hence the transfer sought by the APC, to the extent the exculpatory clauses are given effect, will result in deprivation of the property of such holders without adequate notice to them or opportunity to be heard.

(b) *As to obligors.* On the other hand, if the holders are not effectively stripped of their rights by the vesting, then what the obligors are being deprived of is their own property. No compensation or indemnity is provided for by the Act or conceded by the respondent to be proper. The theory advanced by the APC is that the exculpatory provisions are sufficient to accomplish the discharge of the obligors or, if not, that no constitutional rights are infringed.

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* Petitioners have standing to raise the question of constitutionality as to the bondholders since otherwise the exculpatory provisions of the Act will be ineffective as a defense.

The exculpatory clauses do not provide adequate protection in the case of a suit in a foreign court. Both petitioners have assets abroad and are subject to suit in a number of foreign jurisdictions. This Court has recognized the right of a foreign court to deny the extraterritorial application of the Trading with the Enemy Act within the foreign borders.

These constitutional difficulties cannot be overcome on the theory of the court below,—namely that there can be implied a promise of the Government to pay compensation in the event of double liability, and that this implied obligation will be sufficient to preserve the constitutionality of the Act. Such an implied promise is not consonant with the statutory scheme, it being provided that the statutory remedies are exclusive. Furthermore, no claim for a taking is allowed on the basis of a constitutional right to compensation where (as here) the taking was not authorized by statute.

Moreover, whatever may be the leeway allowed in the case of a suit brought after the taking by those who have been deprived, a court may not affirmatively enforce a taking where there is no express or certain provision for compensation therefor.

4. No policy of the United States declared by Congress would be frustrated by denying validity to this Vesting Order.

POINT I

Negotiable bearer bonds are not subject to the jurisdiction of, or within, a country when neither the instruments nor the holders are there. Since the bonds here involved were therefore neither subject to the jurisdiction of the United States nor within the United States, their vesting was not authorized by the terms of the applicable Executive Order or by the terms of the Trading with the Enemy Act.

Basic Limitations of the Act and Executive Order

The Trading with the Enemy Act § 5(b), as amended in 1941 (55 Stat. 839-40), authorized vesting of property only if the property was subject to the jurisdiction of the United States. The statute (see appendix) provides, with respect to any property in which a foreign national has an interest, that the President may control a long list of actions "by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President * * *." It is clear that the words "property or interest" after the semicolon tie back to the words "property subject to the jurisdiction of the United States" immediately before.

§ 7(c) of the Trading with the Enemy Act (which was in part contained in the original Act) contains no similar express limitation that the vesting be of property subject to the jurisdiction of the United States. While § 7(c) and § 5(b) are to be harmonized so far as possible (*cf. Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 (1947)), if they are in any way inconsistent, the provisions and limitations of § 5(b), as the more recent enactment, must control. Even in the absence of an express limitation, moreover, the

statute would be construed as "meant to apply only within the territorial jurisdiction of the United States." See *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285 (1949); *cf. American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357 (1909).

And even if the statute were indefinite, the Vesting Order must be tested not only against the statutory language but against the terms of the applicable Executive Order, for under § 5(b) the property is to vest only "when, as, and upon the terms, directed by the President * * *." The powers of the APC in this respect are therefore only those given by the President. (Under § 7(c) the provisions as to vesting are preceded by the limitation "If the President shall so require * * *.")

Executive Order 9193, as amended, is the applicable Executive Order specifying what property may be vested; and its provisions, though not mentioned by the court below, are important. The only subdivision of the Order that could be applicable here, § 2(c), requires that the property be "within the United States."* Even if the property were "subject to the jurisdiction of the United States", the Vesting Order would nevertheless exceed the APC's authority unless the property were also "within the United States."

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*"2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(c) Any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof * * *."

See 3 C. F. R. 1943 Cum. Supp. 1174; 50 U. S. C. A. App. (1951) p. 43.

Jurisdiction over, and Location of, Debts Embodied in Negotiable Bearer Instruments

This Court has squarely held that a court was without jurisdiction to declare void the obligation on a negotiable instrument where the obligor, but neither instrument nor holder, was before it. *Bank of Jasper* v. *First National Bank*, 258 U. S. 112 (1922). That case, which arose in the federal courts, dealt with the effect of earlier Florida judgments by which the Florida courts had attempted among other things to determine that certain negotiable certificates of deposit of a Florida bank were void and that a Georgia bank had no interest therein. The Georgia bank had been served by publication only. When subsequently the Georgia bank brought suit in the United States District Court to enforce the certificates of deposit, there was an attempt to plead *res judicata* on the basis of the preceding Florida judgments. This Court held that those judgments were without effect. In an opinion by Mr. Justice BRANDEIS the Court declared:

> "Like other notes they are negotiable and are payable only upon surrender of the instrument properly endorsed. * * *
>
> As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." (258 U. S. at p. 119.)

The above case* also distinguished the situation before it from that which would have obtained had the indebted-

* In the brief in opposition to the petition for certiorari, the APC attempted to distinguish that case on the strange basis that "there has been no attempt in this case to secure a determination that the petitioners, the 'maker', are not liable to the holders of the bond instruments" (p. 10, n.6). Since the whole purpose of the vesting

ness rested in open account. In that event, the indebtedness "would have been property of the creditor within the State of Florida" and "In an appropriate proceeding it might have been reached to satisfy a claim against its owner." (p. 119.) Throughout the proceedings heretofore in the instant case, the APC has persisted in citing cases applicable to simple debts very much as if they applied also to debts incorporated in negotiable instruments. The distinction between the two types of obligation is, however, fundamental in law. It has a sound basis, for the existence of the negotiable instrument subjects the obligor to a liability basically different from that of the obligor of a simple debt, because the transferor of a negotiable instrument, unlike the assignor of a simple debt, has the power to create rights in new obligees beyond those he himself has. *Cf.* Uniform Negotiable Instruments Law, § 57.

The law of New York (where the bonds are payable*) does not differ from that declared in the *Bank of Jasper* case. See *Von Hesse* v. *Mackaye*, 55 Hun 365 (Sup. Ct. Gen. T. 1st Dep't 1890), *aff'd. on the opinion below*, 121 N. Y. 694.

On the other hand, the presence of the negotiable instrument may permit dispensing with the presence of the owner; and the instrument alone supplies a sufficient basis

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would seem to be to cut off the rights of those who the APC asserts are enemy holders," the claimed basis of distinction sounds rather like quibbling. If the vesting which this action was brought to enforce is not intended to deprive the enemy holders of their rights, then it has no conceivable justification under the statute. If it is so intended, then the result sought to be achieved is almost precisely that sought in the Florida action which was held invalid—that is, to cut off rights of the holder and to substitute the plaintiff as obligee.

* As to principal (see the forms of instrument quoted at the beginning of each Indenture). There are alternative places of payment for the coupons.

for jurisdiction *in rem* or *quasi in rem*. Thus, in cases of disputed ownership, the presence of the instrument gives basis for jurisdiction: *First Trust Co. of St. Paul* v. *Matheson*, 187 Minn. 468, 246 N. W. 1 (1932), and see Andrews, "Situs of Intangibles in Suits Against Nonresident Claimants," 49 Yale L. J. 241, 244, where the author, after reviewing the authorities, found it "safe to conclude that the situs of the bonds themselves is the only situs for jurisdiction *in rem* over obligations evidenced by bonds." Likewise the state where the instrument is may escheat the property, *e. g.*; *In re Rapoport's Estate*, 317 Mich. 291, 26 N. W. 2d 777 (1947), *cert. denied*, 332 U. S. 764-765.

Even in the area of attachment and garnishment, where, in the typical situation, the effort is not to deprive the holder of ownership but only to utilize his ownership to satisfy his obligation,* the rules as to when and how levy may be made upon negotiable instruments point to similar principles. *E. g.*, *Clark-Wilcox Co.* v. *Northwest Engineering Co.*, 314 Mass. 402, 50 N. E. 2d 53 (1943); and see Drake, *Attachment*, §§ 587, 588, in which the earlier authorities are exhaustively discussed; 2 Daniel, *Negotiable Instruments* § 930 (7th ed. 1933); Annotation, 71 A. L. R. 581; *cf.* New York Civil Practice Act, §§ 916, 917.

The rules as to jurisdiction in the cases above cited are often phrased in terms of location of the property, or *situs*. Characteristically, the physical instrument is regarded as embodying the property—much as a banknote would be. See particularly *First Trust Co. of St. Paul* v. *Matheson*, *supra*, 187 Minn. at p. 474, 246 N. W. at p. 3, *Von Hesse* v. *Mackaye*, *supra*, 55 Hun at pp. 368-9 *aff'd on opinion below*, 121 N. Y. 694. This recognized viewpoint is important in construing the meaning of the phrase "within

* This distinction is apparently alluded to in the Bank of Jasper case, 258 U. S. at p. 119.

the United States" in the Executive Order. (Compare also in the conflicts area the rule that the validity of the transfer of a negotiable instrument, like that of a chattel, is governed by the law of the place in which the transfer took place: *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 345-6 (1934); *Weissman* v. *Banque de Bruxelles*, 254 N. Y. 488, 494 (1930).)

Under a tax statute, the Government itself has taken the position that where bonds are physically located outside the United States they are not property within the United States (while in the case of stock the presence or absence of the certificates makes no difference). The regulations of the United States Treasury Department in relation to the tax on estates of nonresident aliens under 26 U. S. C. §§ 860-863 provide as follows:

> "*Situs of property.*—Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is *not within the United States* unless physically situated therein. Stock of a domestic corporation, however, constitutes property within the United States, irrespective of where the certificates thereof are physically located.
>
> "Intangible personal property the written evidence of which is not treated as being the property itself constitutes property within the United States if consisting of a property right issuing from or enforceable against a resident of the United States or a domestic corporation (public or private), if not subject to the exceptions prescribed in section 863(a) and (b). * * *." (Reg. 105, § 81.50; italics added.)

To summarize:

For the purpose of jurisdiction the state which has jurisdiction over the document has jurisdiction over the

right (*Restatement, Conflict of Laws*, § 52). This rule obtains where the problem is one of legislative jurisdiction (See *Restatement, Conflict of Laws*, § 62). Or as Beale states the principle: "A bond is always regarded as situated where it is found, and action to reach and deal with bonds may therefore be brought in the state where the bonds are found; and on the other hand an action of the sort cannot be brought where neither the bonds nor the owner of them are within the state * * *." (Beale, *The Conflict of Laws*, § 103.1.)

The court below treated the idea of identification of the instrument with the property as a kind of archaic doctrine, half superstitious in origin, and dispelled by the development in equity of a remedy for the situation when bonds were lost.* To this can be opposed the approach of another great jurist. As Mr. Justice HOLMES remarked in *Wheeler* v. *New York*, 233 U. S. 434, 439 (1914):

> "It is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes, as no one would doubt in the case of bank notes, which technically do not differ from others."

It is also noteworthy that the equitable remedy on which the opinion below relied was contingent on a protection the absence of which here should dictate the contrary result. The price exacted by equity in the case of negotiable bonds is protection of the obligor by suitable indemnity.

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* An interesting comparison with the opinion below is also offered by the discussion in Bozant v. Bank of New York, 156 F. 2d 787, 790 (2d Cir. 1946), in which the opinion was also written by Judge Learned Hand, but in which, in dictum, the historical view is stated with apparent approval.

See, e. g., Prescott v. *Williamsport & N. B. R. Co.*, 159 Fed. 244, 248 (C. C. Pa. 1908). Indeed, equity jurisdiction of actions on missing negotiable bonds arose at least in part from the fact that courts of law could not require the necessary indemnity. 3 Pomeroy, *Equity Jurisprudence*, §§ 831, 832 (5th ed. 1941); see also *East India Co.* v. *Boddam*, 9 Ves. Jr. 464 (1804) (cited by the court below).

That the concept of situs may have proven inadequate in the tax field, as a test for determining when services by the state justify imposition of a tax (*cf. State Tax Commission* v. *Aldrich*, 316 U. S. 174), should not blind one to the very real function of the concept when questions of the right to seize or control property are to be dealt with.

The reasons behind the results in the cases that have been cited are clear. Because the transfer of a negotiable instrument transfers the right and a bona fide purchaser takes it free of previous defenses, and because the action on the instrument is a transitory cause of action, a court which has no control over the instrument or its holder is powerless to protect the obligor against double liability and at the same time to protect innocent purchasers against loss. There is therefore no just basis for compelling the debtor to pay, even though he is subject to the court's power. These principles (and use of the word "situs" in this connection is a shorthand way of summarizing them) apply here, since, as will be shown in more detail below, the holder is beyond the reach of the court and the exculpatory clauses cannot be relied on to discharge the obligor.

It is true that this approach is based on the rules as to the rights of a holder in due course. However, they in turn are based on the practicalities of a long history of finance and trade, first embodied in the common law as to specialties and then in the law merchant and in its modern form in the Negotiable Instruments Law. They are now

firmly embedded. They emphasize the importance of the free transfer of negotiable instruments from hand to hand, without the necessity that a purchaser in good faith go beyond the instrument itself in seeking to obtain his rights. All of these are part of the business man's dealing with a negotiable bond almost as freely as with a banknote, as far as transfer is concerned.

Nothing that the APC has so far adduced furnishes authority for discarding in the present situation these accepted rules.*

Congressional Intent

It was in the framework of the general recognition that the property of a negotiable bond inheres in the instrument that Congress enacted the Trading with the Enemy Act. It, like other federal statutes, perforce assumed the existence of, and sought application to, property rights and obligations as created and recognized by existing law.

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*Moreover, though the APC purported only to vest the obligations evidenced by the bonds and the rights in, to and under the bonds, the judgment of the court below, which did not withhold any of the relief asked for in the complaint (R. 6), would apparently require payment or re-issue of unpaid coupons as well as the bonds themselves, in spite of the absence of any determination in the Vesting Order that the coupons were enemy owned and in spite of the admission of the APC that he could not ascertain what coupons were attached to the bonds at the time when he called for turnover (R. 16). It is recognized that, at least where the matured coupons have been detached and are in the hands of a separate holder, the obligation on the bond and the obligations on such coupons are distinct and separate obligations and give rise to separate causes of action. See Presidio County v. Noel-Young Bond Co., 212 U. S. 58, 75 (1909); Edwards v. Bates County, 163 U. S. 269, 272 (1896); W. S. Bank v. Town of Solon, 136 N. Y. 465, 481 (1893); Long Island L & T Co. v. L. I. C. & N. R. R. Co., 85 App. Div. 36, 39-40 (2d Dep't 1903), *aff'd*, 178 N. Y. 588 (1904). It is clear, therefore, that the Vesting Order is not sufficient to support a judgment for the relief demanded in the complaint.

Can it be said that Congress intended in the Act to overturn the rules as to jurisdiction or change the nature of property embodied in a negotiable bond? The APC below argued that inconsistent state law (statutory or otherwise) must give way to federal power; but it is submitted that no purpose or policy to accomplish such an upset can be spelled out of the provisions of the Act.

There is nothing express in the statute providing for the vesting of negotiable bonds without seizure of the instruments, or defining when property is "subject to the jurisdiction." There is no provision requiring that the obligor should issue a new bond in lieu of one vested without manucaption.

It is significant in this connection that there *is* an express provision, added by amendment during World War I (40 Stat. 1020) making it the duty of a company to issue new share certificates to the APC in lieu of certificates representing vested shares. (See §7(c) of the Trading with the Enemy Act; also 56 Cong. Rec. 11430-1, 11481-2.)

The court below placed some reliance on general breadth of the statutory language as to what property is to be vested (R. 56). Of course it is not disputed that the statutory language authorized seizure of "debts" without limitation to a particular type of debt, and that bonds can therefore be vested. It does not follow that all bonds and debts wherever located can be vested. The word "property" is very inclusive; but no one would contend, for example, that the turnover of gold bullion physically located in Brazil and owned by a German in Germany could be compelled under our Trading with the Enemy Act, though the bullion is unquestionably "property." In both instances the vesting power is limited to the situation where the property is "subject to the jurisdiction." The bullion in Brazil does not satisfy *that* limitation merely because it is property;

nor do the bonds in Germany merely because they embody debts.

The court below appeared to rely on § 9(n) of the Trading with the Enemy Act (enacted—see 45 Stat. 272—as part of the Settlement of War Claims Act of 1928) as indicating Congressional recognition that there had been under the original Trading with the Enemy Act authority to seize bonded indebtedness without seizure of the instrument itself. In the first place, however, the Act, in § 7(d), made provision for voluntary payments or transfers to the APC, and § 9(n) refers to returns in such cases as well as in cases of vesting. Moreover § 9(n) was a remedial provision relating to returns to purchasers or assignees of securities where there had been a vesting or "transfer" without seizure of the instrument: the fact that Congress subsequently felt impelled to give a remedy in that situation does not indicate Congressional approval of previous vestings of negotiable instruments without seizure of the instruments, if there were any such. On the contrary, Congress expressly provided that the transfer to the APC should not be deemed to have invalidated subsequent transfers of the instruments. Even more important, however, is the fact that at most § 9(n) suggests no more than that non-negotiable bonds might have been so seized or transferred. The language of the Congressional Reports (Sen. Rep. No. 273, at p. 30, H. R. Rep. No. 17, at p. 21, 70th Cong., 1st Sess.) suggests indeed that stocks were primarily in mind since the reference in each case is to the "certificate." The Reports similarly refer to "assignments," which is not a term associated with the negotiation of bonds.

There is then nothing in the Trading with the Enemy Act itself to indicate that as to bonds Congress intended to authorize their vesting without seizure of the instru-

ments, especially where the latter were outside the United States.

When we come to the legislative history of the Act, and particularly the history of the amendments to the Act just before and during World War II, that record is seen to be similarly barren of any material to support a contention that Congress intended in the case of bonds to depart from the usual meaning of "subject to the jurisdiction" or usual concepts of the nature of a bond.

Because the APC below placed emphasis on the amendment of § 5(b) in 1940 (54 Stat. 179), and contended that Congress then understood the amendment and also the Executive Order and Regulations which it ratified to apply to bonds abroad, the circumstances of that amendment may be recalled to mind. What was there being discussed was not vesting but blocking. The bases of jurisdiction clearly differ for the two.*

The 1940 amendment was brought about primarily because of doubts expressed (though these doubts professedly were not shared by government officials) as to whether the statute as it previously stood was adequate to authorize *any* controls over transfers of bonds and stocks (see Sen. Rep. No. 1496, 76th Cong., 3d Sess., printed at 86 Cong. Rec. 5169; see also 86 Cong. Rec. 5006, 5175). An examination of the original Executive Order concerned with blocking (Executive Order 8389), as it was issued in April 1940 (3 C. F. R. 1943 Cum. Supp.,

* Broadly speaking, Executive Order 8389 as amended (31 C. F. R., 1949 Ed., §§ 127.9-127.17), the Order relating to blocking, utilizes jurisdiction over persons to prohibit a wide series of transactions, and thus preserve the status quo. It is designed to have its primary impact at the time and place of attempted presentation or dealing or paying here. Executive Order 9193 as amended (3 C. F. R. 1943 Cum. Supp. 1174), the Order relating to vesting, necessarily depends on the other hand on jurisdiction over the property or business to be vested.

p. 645) and as it was ratified (54 Stat. 179) by Congress in May 1940, reveals how uncertain was the application of that Order to stocks and bonds at all, except in so far as a transfer of credit or payment by a bank might be involved. Nevertheless the Treasury in a ruling had construed it to cover (a) transfers by a banking institution *within the United States* of *stock certificates* from or into the names of the foreign "nationals"; and (b) delivery or receipt of *securities* into or out of custody accounts *here* (see General Ruling No. 2 reprinted at 86 Cong. Rec. 5171). It was evidently this ruling that gave rise to the doubts already mentioned (see the Senate Report above cited, 86 Cong. Rec. 5169). The whole of the Congressional action must be understood in the light of the precise controls thus provided for.

The First War Powers Act of 1941 amended § 5(b) so as to make it cover vesting specifically (55 Stat. 839). Under this amendment the specified actions which the President might control in the specified ways were those "by any person, or with respect to any property, subject to the jurisdiction of the United States"; and the statute then went on to make specific provision with respect to the time, manner and terms of vesting of such property (see 87 Cong. Rec. 9862). An express limitation with respect to property was thus inserted, simultaneously with the provisions relating to vesting.

It is fallacious to assume that the earlier legislative history relating to blocking indicates an intent as to the applicability of the vesting provisions to bonds physically located abroad. The language of the statute itself negatives any idea that Congress intended that blocking and vesting be co-extensive.* To name one obvious differ-

* See Bishop "Judicial Construction of the Trading with the Enemy Act," 62 Harv. L. Rev. 721, 723, 749-50 (1949); cf. Propper v. Clark, 337 U. S. 472, 477, n.8 (1949).

ence, § 5(b) authorizes blocking of property if any interest therein is owned by a foreign national; while there can be vesting only to the extent of the property or interest of the national—a much narrower area.

In summary, it is submitted (a) that in the absence of an unmistakably clear indication of a purpose to do so, intent to overturn basic and generally accepted legal concepts cannot be assumed; and (b) that there is in the legislative history nothing to establish such an intent. If, however, it could be concluded that Congress (1) intended to authorize vesting of negotiable bonds located abroad and (2) had the jurisdictional power so to do and (3) had adequately expressed such intent or purpose in the statute, nevertheless, the Executive Order has in relation to securities expressly limited the power to vest to property "within the United States".

Court Decisions under the Trading with the Enemy Act

The important fact in regard to court interpretations of the Trading with the Enemy Act is that, so far as can be discovered, neither in World War I nor in World War II has there been a single decision as to the power to vest negotiable instruments (if in this country) without seizure or demand on the holder; nor has there been a test as to the power to vest negotiable instruments while the instruments themselves were outside the country. The present test is the first, and the Vesting Order here involved was issued in 1949, long after the shooting war with Germany and Japan was over. In spite of the APC's protestations, this delay in attempting such vesting is at least indicative of long-standing administrative practice contrary to the interpretation here sought to be sustained; and it may also suggest that such vestings

are hardly so essential to the war effort as the APC implies.

The APC has suggested that the absence of a test was due not to any doubt of his power but to difficulty of identification of the property.* If the errors as to the three bonds here involved are representative, it may be suggested that adequate basis for identification is still lacking. As to one bond of the three, it is indisputable that there could have been no enemy interest at the time of vesting, the bond having then already been paid. (R. 32.) As to a second, the presentation here by a non-enemy concern, though occurring after vesting (R. 32), suggests a similar error. Indeed the circumstances in this case dramatically emphasize the dangers of mistake and injustice inherent in any vesting of bearer bonds without control over the instruments or their holders. They also imply the limited usefulness in the active conduct of a war of the power here sought.

In the World War I cases involving vesting of bonds, the method was evidently by seizure of or proceedings against the instruments *in rem* or by a demand on and personal jurisdiction over the holder. See, *e. g.*, *Central Trust Co.* v. *Garvan*, 254 U. S. 554 (1921); *Commercial Trust Company* v. *Miller*, 262 U. S. 51 (1923).

All the cases under the Trading with the Enemy Act so far cited by the APC as authority for vesting without seizure of certificates involved shares of stock rather than bearer bonds or other negotiable instruments. (Other cases relating to simple debts were also cited; these are inapplicable for the reasons set out above at p. 16.) As has already been indicated, the provisions of § 7(c), as amended in 1918 (40 Stat. 1020), gave specific authorization for

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* See Brief in Opposition to Petition for Certiorari, p. 10, n. 7.

directing the issuance of new share certificates for shares vested, without requiring seizure and surrender of the old certificates by the APC. This amendment was relied on in the World War I stock cases.*

The classic view is that stock of a corporation has its situs at the place of incorporation (*Jellenik* v. *Huron Copper Mining Co.*, 177 U. S. 1 (1900)). That was the rule in the federal courts at the time Congress enacted the Trading with the Enemy Act. See *Miller* v. *Kaliwerke Aschersleben Atkien-Gesellschaft*, 283 Fed. 746, 754-5 (2d Cir. 1922). The persistence of that concept explains decisions in *Great Northern Railway* v. *Sutherland*, 273 U. S. 182 (1927) and other stock cases, which resisted the modern trend to bestow upon share certificates some of the legal attributes of bonds. In addition, such cases had the support of § 7(c) of the Trading with the Enemy Act, which expressly requires the issuance of new *stock* certificates upon demand of the APC. Such cases furnish no authority for disregarding rules historically and universally applied to negotiable bonds. Cases involving other issues, which in some instances have treated stock certificates as embodying the property for certain purposes, may suggest a basis on which the *Great Northern* case might conceivably have been decided otherwise; but they furnish no reason for extending the result of that case to apply to true negotiable instruments.

Not only historically bu as a matter of present-day business practice there is a difference in the treatment

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* The following cases cited by the APC below are in this category: Great Northern Railway v. Sutherland, 273 U. S. 182, 189 (1927); Baltimore and Ohio Railway Co. v. Sutherland, 18 F. 2d 560 (4th Cir. 1927) (relying on the Great Northern decision); Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft, 283 Fed. 746, 754-755 (2d Cir. 1922); Columbia Brewing Co. v. Miller, 281 Fed. 289, 291 (5th Cir. 1922).

of stock certificates and negotiable bearer bonds, warranting a difference in the exercise of jurisdiction, in the absence of the instrument.

POINT II

The APC has no power either under the Act or the Order to vest property of Cities Service Company or the Bank, neither of which has been determined to be an enemy; nor has the APC power to accomplish what the complaint here seeks, namely the alteration of the obligations of the obligors, and the vesting of the non-existent obligations thus created.

Despite its refusal to accept the doctrine that identifies the property with the instrument, the court below was not blind to the consequences of the kind of liability here involved. As the opinion pointed out, "* * * in the case of a negotiable instrument, like the bonds at bar, the promisee is the holder; but the Alien Property Custodian by hypothesis is not the holder. When he compels the obligor to pay him, he 'takes' the obligor's property in the constitutional sense; he totally deprives the obligor of what he collects, * * *" (R. 60). This passage—despite the reference to hypothesis—indicates recognition of the hard fact that the United States through the exercise of its power has not succeeded in getting possession of the "obligations" or the rights under the bonds; the effect of the Vesting Order, if sustained, is only to compel the payment of a sum of money to the APC without destroying the obligation of the debtor to the holder of the instrument. So long as the instrument remains outstanding, so long is the obligation not completely destroyed; for the obligation is to pay upon presentation of the instrument. What the

obligor is compelled to turn over to the APC is therefore not the enemy's property but its own.

Granted this state of facts, the Act and the Executive Order did not, we submit, empower the APC to compel the payment.

The language of § 5(b) has already been quoted. What we wish to draw attention to here is the shift from the words "property in which any foreign country or a national thereof has any interest", used in subdivision (B) which authorizes blocking, to the words "property or interest of any foreign country or national thereof", used when the statute provides for vesting. This shift must mean that while there may be blocking of the property whenever there is any interest in it held by a foreign national, the vesting permitted is only of the property or interest of the national. See Bishop, "Judicial Construction of the Trading with the Enemy Act," 62 Harv. L. Rev. 721, 723, 749-50 (1949). Likewise the applicable section of the Executive Order, § 2(b), authorizes vesting of enemy property only. It is true, of course, that as the Act has been construed, the APC has the practical power to take possession of property which is not an enemy's, because for purposes of the initial possessory action his determination of enemy character or ownership is conclusive—the remedy in case of error being a claim or suit under § 9(a) (*e. g., Central Trust Co.* v. *Garvan*, 254 U. S. 554 (1921). That is not the situation here, however. The APC is under no misapprehension of the character of petitioners; he has made no finding that they are enemies. Nor is it that petitioners are laying claim to ownership of the bonds. The difficulty is that while purportedly vesting the obligations and the rights under the bonds, the APC, because of the lack of a seizure, has failed to divest the holder of those rights,

and is asking the court to make the obligors pay over their own assets instead.

Moreover, he is asking from the obligors something they never contracted to do, and to that extent also he takes their rights. The obligations of the Cities Service Company and the duties of the Bank are governed by the provisions of the debentures and the related Indentures. As above indicated, neither Indenture makes any provision for the issuance of a new debenture to replace one already issued except under the circumstances where the instrument has been mutilated, destroyed, lost or stolen and provision has been made for adequate indemnity, satisfactory to the debtor and the trustee, against the possible liability (Indentures, Art. II, Sec. 9). No provision is made for payment either of the bearer debentures or of the coupons appertaining thereto except upon presentation of the instruments (see the form of bearer instrument quoted at the beginning of each Indenture). Whatever the obligation purportedly vested by the Vesting Order, there was in fact and law no obligation on the part of Cities Service or the Bank to pay principal and interest of the debenture or to issue new debentures otherwise than in accordance with the terms and provisions of the Indentures. As this Court has recently suggested in *McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241, 249-51 (1949) by the remand for amendment of the pleadings, the APC cannot vest a non-existent obligation or call it into being by declaring it to exist. It would seem to follow therefore that the APC cannot create an obligation different from one actually existing and then hold the supposed obligor to the terms of the APC's creation. The theory of the vesting is that the APC takes over the creditor's rights—he can take only what the creditor has. *Cf. State* v. *Standard Oil Company,*

5 N. J. 281, 298; 74 A. 2d 565, 573 (1950), *aff'd, on other grounds,* 341 U. S. 428 (1951).

The mere removal of certain requirements as to methods of proving ownership (*cf. Great Northern Railway* v. *Sutherland,* 273 U. S. 182 (1927) is readily distinguishable from this attempted alteration of the obligations of a debtor and a trustee.

POINT III

To apply the statute as the APC contends it should be applied would raise serious constitutional questions.

The Constitutional Difficulties

The situation here is one calling for application of the familiar rule that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 390 (1924) quoting *United States* v. *Jin Fuey Moy* 241 U. S. 394, 401 (1916) and citing earlier cases. See also *United States* v. *C. I. O.,* 335 U. S. 106, 120-121 (1948). Such doubts would be raised by the interpretation called for by the APC in this case.

1. The first question presented in this area is whether the property rights of alien friends have not been made subject to taking without compensation and without due process. The stipulated facts establish not only prior seizure by a power then ostensibly an ally, but also the high probability that prior to vesting the instruments were transferred to innocent alien friends as bona fide purchasers. (The seizure by the Russians took place prior to vesting; and the appearance of one of the bonds here before the date of vesting—R. 32—suggests that the

bonds had been disposed of before that date.) This Court has clearly indicated that if property of alien friends were taken without compensation the statute would be unconstitutional as to them. See *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 479-480 (1947).

Even apart from Chase's fiduciary relation to the bondholders, petitioners have standing to raise this part of the constitutional question, because unconstitutionality as to bondholders would affect the availability to petitioners of the exculpatory clauses of the Act (§ 5(b) and 7(e)) as a defense in a subsequent suit by such holders. Petitioners are "entitled to raise the question whether they * * * would be discharged by payment * * *." See *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243 (1944); cf. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 479-80 (1947).*

The holders of these bonds have not been made parties to this proceeding (R. 1, cf. 23-4) and will not be bound by it. Nothing has been shown of any effort to give them notice by publication or otherwise.

In meeting the objection of unconstitutional seizure of alien friends' property, it might be argued that § 9(a) of the Trading with the Enemy Act furnished a sufficient answer. That section, as interpreted in *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 (1947), gives to alien friends without enemy taint the right upon seizure of their property to institute claims. The Court on the basis of this right to institute a subsequent claim, unprejudiced by the prior

* We do not understand this Court's remark in that case as to petitioners' lack of "standing to represent the interests of the pledgees" (p. 474) to mean that petitioners had no standing to question constitutionality on the basis here suggested. The subsequent discussion (pp. 479-80) seems to make clear that consideration was given to the question whether there had been a violation of the constitutional rights of the pledgees.

determination by the APC, has justified the initial effect given in the possessory proceedings to the APC's determination. See, e. g., *Central Trust Co.* v. *Garvan*, 254 U. S. 554 (1921) and *Great Northern Ry.* v. *Sutherland*, 273 U. S. 182, 194 (1927). Primary concern there, in the due process aspect, was with the right to litigate the issue whether the interest seized was indeed an enemy interest. But the essential difficulty presented in acute form in the present case is whether, in the absence of any provision for notice, such a theoretical right to be heard is protection. (It is quite possible in the present case, for example, that a purchaser in, say, Sweden, may not only be without actual notice of the source of his title, but may for years remain ignorant of the vesting.)

Historically the idea has been prevalent that seizure in itself imports some probability of notice. See *Pennoyer* v. *Neff*, 95 U. S. 714, 727 (1877). Obviously, this rationale is inapplicable to the situation of the negotiable bond where there is no seizure of the instrument. Nor do the probabilities of notice which furnish justification for the garnishment of a simple debt, properly apply to the present situation. The obligor and the trustee of bearer bonds do not know who are the owners: As to the foreign purchaser abroad, there is no real provision for notice of the seizure. Certainly publication of the Vesting Order in the Federal Register is not constructive notice to him. The fact that he would not think of his property as being in the United States, but would in all probability accept the established view that his property inheres in the instrument, makes it unreasonable to hold him to knowledge of publication in Washington.

The statute of limitations in this instance runs from the time of vesting or seizure (see 50 U. S. C. A. App. § 33). The effect will be to divest all interest of any non-enemy

bona fide purchasers in the property within the two-year period set by the Act. It is clear that in the absence of provision for reasonable notice to the owner of the property, the protection of § 9(a) is utterly illusory.

In a comparable situation where the time for loss of rights ran from state seizure, this Court indicated the necessity of notice to satisfy constitutional requirements of due process. *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243-7 (1944). See also *Connecticut Insurance Co.* v. *Moore*, 333 U. S. 541, 547 (1948). Notice for purposes of making a judicial decree binding may furnish an analogy (*cf. Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 315-7 (1950) and *Standard Oil Co.* v. *New Jersey*,* 341 U. S. 428, 434-5 (1951), but it is submitted that, in view of the confiscatory purpose of the Trading with the Enemy Act, requirements for notice "appropriate to the nature of the case" (339 U. S. at p. 313; cf. 321 U. S. at p. 246) should be more stringent for vesting than in those situations where long neglect of property by the owner justifies a presumption of abandonment and the assumption that "proceedings against it deprive him of nothing" (see 339 U. S. at p. 316) or in situations where others notified can represent a class although some members may not have had adequate notice (see 339 U. S. at p. 319). It is urged that constitutional requirements of reasonable notice are here unsatisfied.

2. The second constitutional question presented is whether petitioners' property is not being taken for public use without just compensation. As the court below

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* This case did not, of course, present in this Court the question of the right of New Jersey to escheat debts embodied in negotiable instruments outside the state. See 341 U. S. at page 432, note 2.

phrased its view as to an obligor subjected by the vesting to double liability, "it would be hard to find any answer to his claim that the Constitution protected him" (R. 61). Unless the exculpatory provisions of the Act (§ 5(b) and § 7(e).) are sufficient to prevent such a result, petitioners would still be subject to suit by bondholders after having paid the APC.

The court below proceeded on the hypothesis that petitioners would not be protected by these provisions from double liability abroad, and indeed such a conclusion appears to be inevitable. It is not difficult to forecast the probable reaction of a neutral European forum to a statute construed as permitting a seizure, by mere demand on the obligor here, of negotiable instruments held abroad, to the complete defeat of the rights of an innocent holder in the state of the forum. The difference is obvious between such a seizure and the modification effected through control of the monetary system as in the Gold Clause cases (see the APC's Brief in Opposition, p. 16); nor is the reaction of our own courts (especially when dealing with United States statutes) necessarily indicative of that of the foreign courts.

In order to carry on its international banking functions, the Bank maintains branches in England, post-war Germany and Japan, Cuba and Panama, and keeps large balances elsewhere abroad; and it is therefore particularly subject to suit in many foreign countries. Cities Service Company likewise has assets abroad. If, after refusal of payment here, a non-enemy holder in due course of the bonds which the APC claims to have vested were by attachment of such assets to bring action against Cities Service Company or the Bank, in Switzerland, for example, the first question before the Swiss court would be that of the proper choice-of-law rule. Even assuming that the

law to be applied would be the law of the [place of the] obligation,* and even assuming that the effect given the vesting by federal statute would be regarded as part of that law, so as to displace the provisions of § 57 of the Uniform Negotiable Instruments Law,** it seems evident that the foreign forum would decline to give effect to the Vesting Order and exculpatory provisions as effectuating the discharge of the obligation.***

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* Cf. Nussbaum, Deutsches Internationales Privatrecht, unter besonderer Berücksichtigung des osterreichischen und schweizerischen Rechts (1932) § 48 at pp. 330-336.

** N. Y. Negotiable Instruments Law § 96. This is the section providing that the holder in due course holds the instsument free from defenses available as against a prior party. With only a few minor variations it is in effect in all states. See 5 U. L. A., § 57 and Table III.

*** This refusal to give the statute effect might be either on the ground that such vesting orders are "restrictions administratives et pénales," or "purement politique," and therefore subject to the principle of "stricte territorialité," (see Freutel, "Exchange Control, Freezing Orders and the Conflict of Laws," 56 Harv. L. Rev. 30, 45 (1942), and cases there cited) or else on the more explicit ground that to give effect to such measures, even as a defense to the obligor, would violate the "ordre public" of the forum. The Swiss courts have been notably consistent in refusing to give any legal effect whatsoever to such attempted governmental basic alteration or virtual extinction of the obligation, and this even though the contract or obligation was governed by the law of the country now attempting such modification. Rheinische Grundstücks-Handelsgesellschaft m.b.h. gegen A.-G. für Immobilienwerte, 61 II Entscheidungen des schweizerischen Bundesgerichtes—Amtliche Sammlung (Arrêts du Tribunal Fédéral Suisse—Recueil Officiel) [hereafter: BGE] 242 (1935); Nathan-Institut A. G. gegen Schweizerische Bank für Kapitalanlagen, 60 II BGE 294 (1934); Guigue, Déchandon, Auclair et Cie. contre Stromeyer, 40 BGE 483 (1914) (semble), *see also* Bickel & Cie. gegen Schürch, 62 II BGE 108, 110 (1936). In all these cases, the contract or obligation was governed by either German or French law; in each case, the efforts of that state to modify that obligation which its law had originally created was refused effect

The refusal of Continental courts to give effect to these measures of economic warfare has been remarked by many noted authorities. Martin Wolff, *Private International Law* (1950) 473; Adolf F. Schnitzer, *I Handbuch des Internationalen Privatrechts* (3d ed. Basel 1950) 220; Ernst Rabel, "Situs Problems in Enemy Property Measures," 11 Law & Contemp. Prob., 118, 122 et seq. (1945); Freutel, "Exchange Control, Freezing Orders and the Conflict of Laws," 56 Harv. L. Rev. 30 at 44 *et seq.* That this attitude, especially on the part of the neutral nations, is as strong as ever was shown by the unqualified refusal of the Swiss, in the negotiations leading to the 1946 Washington Agreement, to agree to any forced transfer of German-owned property within Swiss territory unless full compensation were assured the German owners.*

In the Brief in Opposition to the Petition for Certiorari (pp. 14-15) as well as in the brief below, the APC cited *Railroad Co.* v. *Collector*, 100 U. S. 595 (1879), as authority for the proposition that double liability for the petitioners abroad did not present a constitutional question. That case, like *United States* v. *Erie Railway Co.*, 106 U. S. 327 (1882), which followed it, was decided as a question of the incidence of taxation, not as a prob-

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by the Swiss courts, and the contract or obligation enforced against the obligor precisely in accordance with its original terms. The German exchange control ("Devisen") laws were characterized by the Swiss Federal Tribunal in the above-cited decisions as attacks on the rights of creditors repugnant to the fundamental principles of Swiss law, and as measures of force then taken unilaterally by a foreign state to protect her own economic interests to the detriment of those of other nations. See Wolff, Private International Law (1950) p. 473n.

* See Paul Guggenheim, "Die Schweiz, das alte und das neue Völkerrecht", 26 Schweizer Monat Hefte 321 (No. 6, September 1946); N. Y. Times, 1946, Apr. 8, p. 4, col. 5; Apr. 13, p. 11, col. 4 and Apr. 29, p. 4, col. 5.

lem of whether double liability would violate the Fifth Amendment. The Court construed the tax, the validity of which was in question, as one on the earnings of the corporation and sustained it on that basis. (See 100 U. S. at p. 598). The Court treated as immaterial the question whether the corporation could to the extent of the tax relieve itself of its obligation to pay interest on its bonds—a deduction authorized by the statute. Power to tax a domestic corporation, regardless of the corporation's recoupment of the tax, undoubtedly exists; but its existence forms no basis for holding that there would be power to exact double payment of the debt, not as a tax but by a seizure which in theory was a seizure of the right of the obligee.

The APC's argument that no constitutional right is violated ignores the necessary conclusion that, to the extent the APC's action is ineffective as against the obligees of the debt on the bonds, it is the obligors' property which is being taken by enforcement of the vesting.

This Court has conceded the right of a foreign court to deny extraterritorial application of the Trading with the Enemy Act so as to affect rights within the foreign country. See *Ingenohl* v. *Olsen & Co.*, 273 U. S. 541 (1927). In that case plaintiff owned a business and related trademarks in the Philippine Islands. He expanded the business into Hongkong and registered the trademarks there. During World War I the APC seized the property " 'wheresoever situate in the Philippine Islands * * * including the business as going concern, and the good will, trade names and trade-marks thereof, of Syndicat Oriente,' * * *" (p. 543). Subsequently these properties were sold by the APC to defendant. Plaintiff then sued defendant in Hongkong and there obtained a judgment declaring that plaintiff was owner of the trademarks, enjoining defendant

from selling under the trademarks and awarding costs to plaintiff. When the plaintiff brought suit in the Philippines on his judgment for costs, this Court held that he should recover, Mr. Justice HOLMES saying (p. 544):

> "When, then, the judge who, in the absence of an appeal to the Privy Council, is the final exponent of that law, authoritatively declares that the assignment by the Custodian of the assets of the Manila firm cannot and will not be allowed to affect the rights of the party concerned in Hongkong, we do not see how it is possible for a foreign Court to pronounce his decision wrong. It will be acted on and settles the rights of the parties in Hongkong; and in view of that fact it seems somewhat paradoxical to say that it is not the law. If the Alien Property Custodian purported to convey rights in English territory valid as against those whom the English law protects he exceeded the powers that were or could be given to him by the United States."

By reasoning similar to that of the English judge in Hongkong, a court outside the United States might readily decide that a statute, executive order and vesting order construed by the United States courts to affect rights there should be treated as having no force at all outside the United States. To the extent therefore that the Bank or Cities Service is or may be subject to suit outside the United States on the debentures, the exculpatory provisions of the Trading with the Enemy Act may prove cold comfort.

The Ineffectiveness of an "Implied" Right to Compensation by the United States to Avoid the Constitutional Questions.

The court below, constrained to recognize the constitutional problems and acknowledging that "it would be hard to find any answer to [an obligor's] claim that the Constitution protected him" (R. 61), cut its way through

the difficulty by holding that in the event of double liability the obligors would have the right to recover from the Government, on the basis that an implied promise by the United States to pay compensation would arise from the taking for a public purpose. Although the opinion did not deal with the mechanics by which the obligors' remedy was believed to be obtainable, the cases cited by the court (see R. 59) suggest that what was in mind was a suit under the Tucker Act (see 28 U. S. C. §1491; also §1346).

Although a right to compensation is necessary to sustain the Vesting Order, and although petitioners are desirous of obtaining compensation if the Order be upheld, they have been impelled to the conclusion that such a remedy does not comport with the statutory scheme set up by Congress; and that the right is too uncertain for the Constitution to permit court enforcement of the application of the statute presently sought by the APC.

The whole constitutional difficulty arises, of course, from the construction of the statute given by the court below, which departed from the normal meaning that would be given to the restrictive term "subject to the jurisdiction of the United States." The very fact that Congress made no provision for the type of situation here presented strongly implies that no such application of the statute as was made below was in contemplation of that body.

The statutory scheme of the Act as hitherto applied may be sketched in broad strokes as follows: In the interest of speed under wartime conditions, initial seizure of property of citizens may be permitted if the APC determines (mistakenly or otherwise) that the property is "enemy" owned (under the special definitions of "enemy" developed administratively). However, the retention of property of any citizen or other person without enemy

taint is not authorized, and a remedy is available under § 9(a) for the return of any seized interest or property belonging to any such person. *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480.

That the framers of the Act felt that no provision outside the Act was necessary for the protection of non-enemies is shown by § 7(c), which provides that "The sole relief and remedy of any person having any claim to any money or other property * * * paid over to the Alien Property Custodian, or required so to be * * * shall be that provided by the terms of this Act * * *." No part of the Act makes provision for compensation in instances where double liability is imposed on obligors without enemy taint. Unless § 9(a) were deemed available to petitioners, it seems clear that not only is no remedy provided for by the Act, but that the implication of a promise to compensate is contrary to the limitations of the Act.

There are difficulties, both logical and practical, to construing § 9(a) as applicable to petitioners. What the APC declared to be vested was the obligation and the rights "in, to and under" the bonds (R. 8-9). It would be difficult to argue that petitioners had, in the normal legal sense of those words, any "interest, right or title" in *that* property, as would be required by § 9(a). If, however, petitioners were to urge in a proceeding for return under § 9(a) that what had been transferred was in fact not what was purportedly vested—namely the obligation and the rights under the bonds—but petitioners' own property, then the obvious rejoinder would be: "Assuming that what you say is so, the APC established no proper basis, and did not purport to call, for the transfer to him of your property, and the question should have been raised at the time the turnover was directed." In other words a decision now in favor of the APC's right to the turnover is, under

the particular facts of this case, necessarily also a determination that the vesting could and did reach what was purported to be vested—that is, the obligation and the rights under the bond. In this particular case there is no logical basis for differentiation between a right to initial possession and the right to retention, since both alike turn on whether the obligation to the holders can be reached by the method used. The difficulties result from the unrealistic attempt to separate the obligation from the instrument which inevitably carries the rights.

There is likewise a practicable obstacle, seemingly insuperable, to regarding the remedy under § 9(a) as adequately available. As has already been indicated, the statute of limitations for claims under the Act runs from the date of the vesting. But under the theory of the court below seemingly the taking of petitioners' property is either not effectuated or is not complete (it is not clear from the opinion which) until the judgment of the foreign court imposes liability. Obviously this not only could not in this instance, but in all probability would not in other cases, occur until after the statute of limitations had run against petitioners' claim.

The court below however seemed to be thinking not in terms of a claim under § 9(a), but of an implied claim entirely outside the terms of the statute. It cited as authority for its view *Silesian-American Corp.* v. *Clark*, 332 U. S. 469 (1947). We respectfully inquire of this Court whether the opinion in that case meant to imply more than that the pledgees (who would have an "interest" in the property there seized, in the ordinary meaning of the term "interest") had a remedy under § 9(a). If, however, the *Silesian-American* opinion meant to imply, as the court below believed, that an implied promise to compensate would arise entirely outside the statutory scheme of the Trading with

the Enemy Act, and that such a right would be sufficient to avoid constitutional difficulties, then with all deference we urge that extension to this case—where the compensation would be for a double liability which seems not to have been contemplated by Congress—calls for reconsideration by the Court of the principle of that case.

There are serious difficulties in the way of implying a right to compensation. In the first place, not only was compensation not authorized by the statute, but the taking, in the constitutional sense, was not authorized either. As has already been shown, the statute did not authorize either seizure of property outside the jurisdiction of the United States (from which double liability results), nor did it authorize the taking—i. e. retention—of property of citizens without enemy taint. Even though the APC maintains here his right to vest, he does not do so on any theory that this results in taking petitioners' property.

The taking of private property for public use is deemed to be against the common right, and authority to do so must be clearly expressed. *Delaware, Lackawanna and Western Railroad Company* v. *Morristown*, 276 U. S. 182, 192 (1928). Compensation is so far essential to the power to take for a public use "that the absence of a provision for it has been regarded as important in determining the intention of the legislature when a grant of such power is claimed." *See Western Union Telegraph Company* v. *Pennsylvania Railroad*, 195 U. S. 540, 568 (1904). It is established that no claim to a right for compensation can be recognized where the taking was not authorized by statute.* *Hooe* v. *United States*, 218 U. S. 322, 335-6 (1910); *see United States* v. *Goltra*, 312 U. S. 203, 208

* That there may be subsequent statutory ratification or adoption of the taking (Crozier v. Krupp, 224 U. S. 290 (1912)) is immaterial for purposes here.

(1941). In the cases cited by the court below as authority for its view (R. 59), wherever recovery was allowed one of the elements was that the officers of the Government had statutory authority for the taking. That element is lacking here. The holding in *United States v. North American Co.*, 253 U. S. 330 (1920), cited by the court below, that the cause of action did not accrue until the time when such authority existed (see pp. 333-4), is squarely in point as to the effect of the absence of statutory authority in defeating a claim.

Moreover, what those cases held or said was that the one deprived could recover from the Government (or in one instance that there was no right to enjoin*). They did not hold that a court should lend its powers to enforce the taking in spite of the absence of express or certain provision for any compensation at any time—a vastly different thing. If the view of the court below were accepted, it would evidently follow that no taking could be unconstitutional since the mere threat of unconstitutionality would suffice to give rise to the saving right of compensation. Such a view conflicts with the well-recognized rule that whenever private property is taken for public use "it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the

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* Hurley v. Kincaid, 285 U. S. 95 (1932). The plaintiff had conceded the authority of the defendant officers and the validity of the Act, which provided for condemnation proceedings not used in his case. He attempted to enjoin a flood control plan, on the theory that the mere threat of a flowage over his land constituted a taking. The court held that there was no need to pass on the substantiye questions, since if his theory was right he had an adequate remedy at law in an action for compensation, where he could obtain everything obtainable in the condemnation proceedings which were all he claimed he had a right to. For a case where the injunction was held available, cf. Delaware, Lackawanna & Western Railroad Co. *v.* Morristown, 276 U. S. 182 (1928).

owner." *Sweet v. Rechel*, 159 U. S. 380, 399 (1895). See also *Chicago, Milwaukee and St. Paul R. R. v. Wisconsin*, 238 U. S. 491, 500 (1915); *In re Manderson*, 51 Fed. 501 (3d Cir. (1892); *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U. S. 226, 238, 241 (1897); *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U. S. 540, 567-568, 570 (1904).

Where the Government invokes the aid of a court to put it in possession of property it seeks to take, it seems clear that there must be reliance upon the terms of a statute which affords to the owner "reasonable, certain and adequate provision for obtaining compensation" (*Cherokee Nation v. Kansas R. Co.*, 135 U. S. 641, at p. 659 (1890)). No statute can afford such reasonable, certain and adequate provision unless it recognizes the right of the owner to just compensation, and makes provision for the prompt determination and payment of such compensation from the public funds.

POINT IV

No policy of the United States declared by Congress would be frustrated by denying validity to the Vesting Order here involved.

A contention of the APC throughout has been that the bonds should be determined to be within the reach of the statute and Executive Order in order to effectuate the broad purposes of the Act. (Cf. the Brief in Opposition to the Petition for Certiorari, pp. 5-6.) The court below was concerned at the possibility of frustrating the policy of the vesting program (see R. 61).

Though we contend that the statutory language is precise and should be controlling, nevertheless the argument raises basic questions. The first is the question as to what

precisely is the policy, and whether that envisioned by Congress coincides with that now set out by the APC. The next is whether, at the stage of the war at which these bonds were vested*—in 1949—it could be claimed to be necessary, as a part of economic warfare, to attempt to gather in assets of this type on the theory either that advantage could be drawn from them by the enemy or that their availability to the United States will assist in its battle (cf. Brief in Opposition, pp. 5-6). The time when the attempt was first made to enforce vesting of bearer bonds without seizure is an indication of the lack of true necessity—blocking served the purpose. The APC, in explaining the reason why no earlier test of his powers as to negotiable bonds was sought, has intimated that until the occupation there was no way of obtaining the necessary information as to bond numbers (Brief in Opposition, p. 10, n. 7); and this is likely also to be the situation in a future war. Third, and even more fundamental, is the question whether any thwarting of the APC's vesting program will not continue to exist quite apart from any adverse decision of this Court, because the real obstacle to what the APC would like to do in the way of reduction to possession lies in the inability of this country to control all events and laws beyond our borders. As long as foreign courts are available to bondholders, it is improbable that all collections by bondholders can be prevented, regardless of this Court's decision.

Even if a broad concept of the purpose of the Act were to be chosen as the guide to construction, the confusions as to the purpose would render the problem one of great difficulty. Particularly as to the various amend-

* By Joint Resolution of Congress in 1951 (65 Stat. 451), the war with Germany was formally declared to be ended, Congress stating, however, that the vesting power was reserved as to property which prior to 1947 was subject to vesting or seizure.

ments of § 5(b), there have at different times been somewhat different ideas as to the basic aims to be effectuated by blocking and vesting.* There seems never to have been an official administrative statement of purpose. At the risk of oversimplification, it may be said in general that in the early days of blocking the fundamental purpose was to protect the property of the invaded countries, and also to prevent benefit to Germany from such property. Congressional discussion at the time of the 1940 amendment included discussion of such aims. (See 86 Cong. Rec. 5006-8, 5172, 5176-80.) Later, after the United States had become an actual belligerent, the purpose seems to have broadened to include the full reach of economic warfare—the seizure and utilization of enemy-owned property in behalf of the United States (see H. R. Rep. No. 1507, 77th Cong., 1st Sess.; 87 Cong. Rec. 9838, 9845, 9865-6; cf. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 475-6). Not until 1948, by the enactment of a provision that no part of the seized property was to be returned to German or Japanese nationals (62 Stat. 1246, 50 U. S. C. App. Supp. IV § 39) was it made plain that there was to be true confiscation.

Suggestive of possible variances between Congress's view of purpose and that of the APC is a program to utilize the seizures to aid countries which were to receive assistance under the European Recovery Program, through enabling them to locate and make use of at least some part of

* Cf. Reeves, Control of Foreign Funds, 11 Law & Contemp. Prob. 17 at 18, 26 (1945); Alk and Moskovitz, Removal of United States Controls over Foreign-Owned Property, 10 Fed. B. J. 3 at 3-5 (1948); Freutel, Exchange Control, Freezing Orders and the Conflict of Laws, 56 Harv. L. Rev. 30, 31 (1942); Bishop, Judicial Construction of the Trading with the Enemy Act, 62 Harv. L. Rev. 721, 721-3 (1949); Note, 41 Col. L. Rev. 1039, 1042-4 (1941).

the concealed dollar assets of their own nationals. The method was to be (1) an announcement of prospective transfer to the Office of Alien Property of administration of all blocked property not certified by the appropriate foreign government or licensed by the U. S. by a specified date; (2) a new census of blocked property; (3) making the census information available to the appropriate foreign governments, and afterwards releasing property which the foreign government found to be owned by its residents; (4) vesting accounts remaining uncertified after a deadline date, on what was termed a presumption of enemy ownership.* See the letter of Secretary Snyder, as Chairman of the National Advisory Council, to Senator Vandenberg, February 2, 1948, released to the Press on that date.

Such a program appears to be rather different from what Congress contemplated in 1940 and 1941, and not very closely connected with war purposes—at least those of World War II.

Can a safe guide to statutory construction be found in a purpose susceptible of so many convenient variations to meet administrative views of changing needs?

Assuming that the objectives were the Congressional ones of preventing benefit to the enemy and permitting utilization by the United States, must it be assumed that vesting better than blocking will perform the function? Insofar as preventing the benefits of looting is concerned, the French Minister of Finance wrote on September 26, 1945 to the Secretary of the Treasury (the letter was attached to the Treasury's Press Release No. V-75): "Application of these principles [by blocking] by your Department has effectively prevented the enemy from

* This presumption suggests in terrorem action to shake down concealed wealth of friendly aliens. Cf. Clark *v.* Uebersee Finanz-Korp., 332 U. S. 480, 487 (1947).

looting French assets in the United States during the war. . . .'' Cf. Bishop, Judicial Construction of the Trading with the Enemy Act, 62 Harv. L. Rev. 721, 722: ''The freezing program * * * seriously interfered with its [the Axis'] plans for the looting of conquered countries. * * * As it was, few neutrals cared to speculate in evidences of ownership which American law declared null and void.'' For preventing speculators from unloading securities purchased from the enemy, as well as minimizing enemy benefits from any enemy property, the utilization of blocking procedures would appear to suffice; and because of its mechanics, its choice of principal place of impact at the point of attempted liquidation in this country, and the absence of a seizure which in a short time becomes irremediable, the method of blocking seems to present fewer potentialities of ultimate harm to innocent persons, and fewer jurisdictional problems. Clearly at the time when Congress gave evidence of approving the purpose of preventing enemy benefit from looting, the only methods before it were the methods of blocking. A decision against jurisdiction to vest while the instrument remained outside the country would still leave jurisdiction to apply controls upon presentation of the instrument in this country; and thus full scope would be afforded to all Congress purposed in that connection.

In so far as concerns the objective of making enemy assets available to the United States for utilization by it, as has already been argued, this objective is hardly to be obtained by making these obligors pay the APC as long as collection can be had again from them abroad.

To conclude: We believe that had Congress intended the method here attempted by the APC it would (a) have omitted from the Act the restriction that the property to be vested be subject to the jurisdiction of the United

States; and (b) have provided expressly for indemnity for its own nationals hurt in the process of attempted vesting beyond our borders. There are possibilities of serious damage to the general welfare in the course of action now being attempted by the APC: damage to internal and foreign trade and commerce from the damage to the negotiability of negotiable instruments; danger that other nations, following our lead, may be encouraged in the attempt to confiscate at long range securities owned by our nationals; above all, there is the danger that results when nations abandon civilized self-restraint and by their assertions of extraterritorial jurisdiction make it unsafe for the individual or business, threatened with conflicting demands and the possibility of being caught between them, to venture from home to carry on the world's commerce.

Wherefore it is respectfully prayed that the judgment of the United States Court of Appeals for the Second Circuit be in all respects reversed and that the judgment of the district court be affirmed.

Respectfully submitted,

TIMOTHY N. PFEIFFER,
Counsel for Petitioner,
The Chase National Bank of the City of New York.

ROY C. HABERKERN, JR.,
REBECCA M. CUTLER,
RALPH C. MURRAY,
of Counsel.

THEODORE N. JOHNSEN,
Counsel for Petitioner,
Cities Service Company.

December, 1951.

APPENDIX

Statute

TRADING WITH THE ENEMY ACT, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.*

Sec. 5.

* * * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or

property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in

reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

* * * * * *

Sec. 7.

* * * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded, shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * * *

Sec. 9.(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or

by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treas-

urer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

Executive Order

EXECUTIVE ORDER No. 9193, July 6, 1942, 7 Fed. Reg. 5205, as amended, Exec. Order 9567, June 8, 1945, 10 F. R. 6917; 3 C. F. R., 1943 Cum. Supp. 1174.

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(c) any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof * * *